

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JUSTIN MICHAEL CREDICO	:	CIVIL ACTION
	:	
v.	:	
	:	
THE ATTORNEY GENERAL OF	:	
PENNSYLVANIA, EDWARD	:	
McFADDEN and THE DISTRICT	:	
ATTORNEY OF THE COUNTY	:	
OF CHESTER COUNTY	:	NO. 13-2819

MEMORANDUM OPINION

Savage, J.

July 20, 2017

Petitioner Justin Credico has filed a Rule 60(b) motion seeking to reopen his § 2254 habeas action which was dismissed almost three years earlier. This action, like multiple others he has filed in the state and federal courts, relates to his November 30, 2011 state court conviction of harassment based on threatening emails he sent to the President and Chief of Police of West Chester University.

On February 25, 2014, Judge Yohn dismissed his habeas petition because his claims were procedurally defaulted. Credico had not filed a direct appeal or a petition under the Post Conviction Relief Act in the state courts challenging his conviction. Judge Yohn found that Credico did not establish cause to excuse the default. He rejected Credico's arguments that both the Chester County Court of Common Pleas and the Adult Probation/Parole Office had interfered with his ability to litigate his appellate claims by causing him to be homeless, leaving him with no address at which to receive legal mail, and by failing to hold his legal mail for him.

Now, more than three years after the dismissal of his habeas petition, Credico claims that he has new evidence "to explain away the procedural default." He contends

that government officials interfered with his efforts to comply with the Pennsylvania appellate requirements by incorrectly listing his address as Chester County Prison on court records even though they knew that he was not at that address. He argues that, as a result, he did not receive the final judgment of sentence; and consequently, he missed the deadlines to appeal his conviction to the Superior Court.

Credico has presented no new evidence to explain away his failure to exhaust his state court remedies. Because it was his, not the state officials', responsibility to comply with the state's procedural rules, Credico cannot establish cause for the procedural default of his claims. He was obliged to advise the courts of his mailing address and to monitor the status of his case. Therefore, we shall deny his motion.

Procedural History

On February 16, 2011, Credico was charged with four counts of harassment under 18 Pa. Cons. Stat. § 2709(A)(7) for sending threatening emails in January and February of 2011 to the President and the Chief of Police of West Chester University. He claims that he sent the emails while attempting to obtain his transcripts so he could correct errors on them.¹

Credico was preliminarily arraigned on March 3, 2011, at which time he was detained at the Chester County Prison where he remained until he was sentenced on December 19, 2011. On October 13, 2011, while in pretrial detention, Credico filed his first § 2254 petition for habeas relief.² On November 30, 2011, the petition was dismissed for failure to state a claim.

¹ Revised Pet. (Doc. No. 5) at ECF 2; Mot. to Reopen for Exceptional Circumstances (Doc. No. 21) at ECF 13–14.

² Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. No. 1), Credico v. McFadden, Civ. No. 11-6439 (E.D. Pa. filed Oct. 13, 2011).

On November 30, 2011, after a two-day bench trial before Judge Streitel in the Chester County Court of Common Pleas, Credico was found guilty on two counts of harassment and not guilty on a third count.³ Prior to sentencing, Credico filed four *pro se* post-trial motions. On December 19, 2011, at his sentencing hearing and after his motions were denied, his trial counsel was permitted to withdraw. Credico, at his insistence, proceeded *pro se*. He was sentenced to time served and granted immediate parole.⁴

After imposing sentence, Judge Streitel advised Credico of his appellate rights. She informed him that he had the right to file either a direct appeal to the Superior Court within thirty days or post-sentence motions within ten days. She explained that if he filed a post-sentence motion and it was denied, he had thirty days from the denial of post-sentence motions to file an appeal to the Superior Court. He was also advised that he could file an appeal *in forma pauperis*; he had the right to counsel on appeal; and, if he could not afford counsel, an attorney would be appointed to represent him free of charge. Credico was provided with a written post-sentence colloquy form explaining those rights in detail.⁵

Credico filed seven timely *pro se* post-sentence motions. On January 3, 2012, while the post-sentence motions were pending, he filed a Notice of Appeal to the Superior Court of Pennsylvania. On February 10, 2012, Judge Streitel issued a

³ A fourth count was dismissed.

⁴ At the start of the trial, Judge Streitel asked Credico's counsel about where he would reside upon his release from prison. Counsel informed the court that the plan was for him to stay at a transitional shelter until he could find something more permanent. Judge Streitel's response was that she could not release him unless the probation office had made arrangements for him to go to a shelter.

⁵ Answer App. A (Doc. No. 9-1) at ECF 218–20, 224–25.

Pennsylvania Rule of Appellate Procedure 1925(a) statement recommending that Credico's appeal be dismissed as premature.

On February 21, 2012, the Superior Court entered an Order directing Credico to file a docketing statement within ten days. Two days later, the Superior Court entered an order to show cause why the appeal should not be quashed as interlocutory because his post-trial motions were pending. Credico did not respond to either of the Superior Court's orders. Accordingly, his appeal was dismissed on March 5, 2012 for failure to file a docketing statement.

On April 23, 2012, Judge Streitl entered an order denying Credico's *pro se* post-sentence motions. The order again advised Credico of his appellate rights.⁶ He did not appeal the judgment of sentence, nor did he file for relief under Pennsylvania's Post Conviction Relief Act ("PCRA").

Six weeks later, on June 8, 2012, Credico filed his second federal habeas petition.⁷ Eleven days later, then-Magistrate Judge L. Felipe Restrepo issued a report and recommendation, recommending that the petition be dismissed without prejudice for failure to exhaust state court remedies. On July 12, 2012, no objections having been filed, Judge Yohn approved and adopted the report and recommendation. On September 11, 2012, Credico filed a notice of appeal from Judge Yohn's order adopting the Report and Recommendation. On May 7, 2013, the Third Circuit dismissed the

⁶ According to the docket, the order states: "Deft is advised that this is a final Order. Deft. has the right to appeal by filing a direct appeal to the Pennsylvania Superior Court no later than 30 days from the date of this Order. Deft is further advised that he has the right to assistance of counsel in preparation of his appeal, and that if Deft is indigent, he has the right to appeal in forma pauperis and to proceed with assigned counsel."

⁷ Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. No. 1), Credico v. Adult Prob./Parole (Chester Cty.), Civ. No. 12-3269 (E.D. Pa. filed June 8, 2012).

appeal because it had been filed late and the district court had denied Credico's motion to reopen the time for filing the appeal.⁸

On May 20, 2013, three weeks after the Third Circuit dismissed his appeal from the order dismissing his habeas petition for failure to exhaust, Credico filed the habeas petition in this action. Judge Yohn referred the petition to Magistrate Judge Lynn Sitarski for a report and recommendation. She found that Credico had failed to exhaust his state court remedies because he had not presented his claims on direct appeal or in post-conviction proceedings. The time to file a direct appeal seeking review of the trial court's April 23, 2012 order denying his post-sentence motions expired thirty days later. The post-conviction petition deadline passed on May 24, 2013, one year after the judgment of sentence became final on May 23, 2012. Accordingly, on September 19, 2013, because Credico's claims were procedurally defaulted for purposes of habeas review, Magistrate Judge Sitarski recommended that the petition be denied.

Magistrate Judge Sitarski found that the default was not excused because Credico did not demonstrate cause and prejudice, or a fundamental miscarriage of justice. Credico had argued that he established cause for not exhausting his state court remedies because he was homeless, did not have an address to file or receive his mail, and had a life-threatening rabies illness. He asserted that the "15th Judicial District" was supposed to be holding his legal mail for him, but at some time stopped giving him his mail. He also blamed the rabies infection on the state because he was "thrown out into the streets without housing (that the 15th Judicial District told him was available)."⁹

⁸ Credico v. Adult Prob./Parole (Chester Cty.), C.A. No. 12-3779 (3d Cir. May 7, 2013).

⁹ Am. Pet. (Doc. No. 3) at ECF 2.

He contended that the Superior Court dismissed his appeal because he “did not have an address to file/receive mail.”¹⁰ Magistrate Judge Sitarski concluded that “homelessness and illness . . . are not . . . the type of circumstances that have been found to constitute cause.”¹¹

Credico filed objections, arguing that the procedural default should be excused because the government officials’ actions caused his missing the appellate filing deadlines. Specifically, he stated that he lacked a “mailable address” and got his “rabies injury” as a result of “the defendants and officials throwing [him] into the streets knowing on record that he was homeless and fail[ed] to properly follow parole discharge rules.”¹² Another way they purportedly interfered with his “access to litigate his appeal properly” was that Adult Probation/Parole did not always “notify the petitioner of the necessary appellate orders issued” or give him his legal mail that was being directed to their office.¹³

On February 25, 2014, Judge Yohn, agreeing with Magistrate Judge Sitarski that Credico had failed to establish cause for the default, adopted her recommendation. Judge Yohn pointed out that prior to granting Credico’s motion to proceed *pro se* at his sentencing, the trial judge warned him that, as a *pro se* defendant, he still had to comply with procedural rules and risked waiving any claims that did not comply with the rules. Judge Streitl instructed Credico as follows:

The advantage of being represented by counsel is counsel’s familiarity

¹⁰ Revised Pet. at ECF 1, 5, 13, 15, 17.

¹¹ R. & R. (Doc. No. 13) at 11.

¹² Objs. to R. & R. (Doc. No. 14) at 2.

¹³ *Id.* at 3.

with calling witnesses and presenting evidence on the defendant's behalf, filing, presenting and arguing motions for new trial and/or in arrest of judgment, arguing circumstances, facts and law and presentation of witnesses in mitigation of sentence. Defenses are waived or lost permanently if not raised at trial and, therefore, there are a variety of other rights lost permanently if not brought up at the appropriate time. For example, in request for mistrial, which was untimely, if and when errors occur during a trial and right to appeal based on the errors is permanently lost unless the defendant objects to the errors at the appropriate time. You will be precluded from asserting ineffective assistance of counsel concerning all proceedings in which you represent yourself.¹⁴

Judge Yohn explained that after sentencing, the trial court had advised Credico of his rights to file post-sentence motions and to appeal, and provided him with a written post-sentence colloquy explaining those rights. He noted that Judge Streitl again explained his right to counsel to represent him for post-sentence motions and an appeal. Nevertheless, Credico refused counsel. Later, when she dismissed Credico's post-sentence motions, Judge Streitl warned Credico that if he wished to file an appeal, he had to do so within thirty days of the order. She reiterated his right to counsel.

Recognizing that it may be difficult for a homeless and sick *pro se* petitioner to comply with appellate procedural rules, Judge Yohn noted that

rather than interfering, the state court gave Credico every consideration and instruction that it could to ensure Credico would comply with the required procedural rules. Having refused the proffered counsel, and having failed to comply with the rules, Credico cannot now plead cause because he was sick and homeless at the time he was required to comply with Pennsylvania's appellate rules.

Credico v. Att'y Gen., Civ. No. 13-2819, 2014 WL 716745, at *5 (E.D. Pa. Feb. 25, 2014).

Credico filed a notice of appeal from Judge Yohn's order dismissing his petition,

¹⁴ Answer App. A at ECF 195–96.

and later an application for a certificate of appealability. On July 11, 2014, the Third Circuit denied his request, holding that the district court correctly determined that his claims were procedurally defaulted. It also found that Credico did not make a substantial showing of the denial of a constitutional right with respect to the merits of his claims.

On February 11, 2015, Credico filed a new habeas action, raising entrapment as a ground for relief.¹⁵ Because this was Credico's second petition attacking his 2011 harassment conviction and his first habeas petition had been considered on the merits and dismissed in February of 2014, Judge Yohn dismissed the new petition as second or successive on March 12, 2015.

Credico filed a notice of appeal from the March 12, 2015 order.¹⁶ Construing his notice of appeal as a request for a certificate of appealability, the Third Circuit denied his request because his petition constituted a second or successive petition.¹⁷ On December 15, 2015, the court denied Credico's petition for en banc and panel rehearing.¹⁸

Two weeks later, Credico filed an original action in the Third Circuit, which was a request for permission to file a second or successive habeas petition.¹⁹ In his

¹⁵ Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody or in the Alternative for a Writ of Error (Doc. No. 1), Credico v. Att'y Gen., Civ. No. 15-721 (E.D. Pa. filed Feb. 11, 2015).

¹⁶ Notice of Appeal (Doc. No. 5), Credico v. Att'y Gen., Civ. No. 15-721 (E.D. Pa. filed Mar. 30, 2015).

¹⁷ Credico v. Att'y Gen., C.A. No. 15-1898 (3d Cir. Oct. 29, 2015).

¹⁸ Credico v. Att'y Gen., C.A. No. 15-1898 (3d Cir. Dec. 15, 2015) (en banc).

¹⁹ Mot. to File New Pet. for Habeas Corpus, *In re Justin Credico*, C.A. No. 15-4046 (3d Cir. filed Dec. 29, 2015).

application, Credico argued that he should be permitted to present a new claim of entrapment²⁰ because he had “new evidence” to support the claim. He asserted that he learned of this new evidence from the “Phila FBI arresting officers” in the federal criminal case against him.²¹ He contends they told him that when he was charged with harassment in 2011, the university police had control over the school’s records because Police Chief Michael Bicking was acting as interim president of the university. On January 15, 2016, the Third Circuit denied Credico’s application to file a second or successive petition because he failed to make out a prima facie case that the facts underlying the claim of entrapment, if proven, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the underlying offense.

Nine months later, on October 13, 2016, Credico again requested permission from the Third Circuit to file a second or successive habeas petition regarding the 2011 harassment conviction.²² This time he based his request on the June 2015 decision in *Elonis v. United States*, 135 S. Ct. 2001, which he characterized as a new rule of constitutional law that applied retroactively to his case.²³ On November 17, 2016, the

²⁰ His entrapment claim is that the West Chester University police, who arrested him for his 2011 harassment charges, had, and continue to have, complete control of his college transcripts and records, which he needs now and needed at the time of his arrest in order to further his education and attend another university. He argues that because he would be arrested when he tries to get his transcripts, he will never be able to pursue his education. *Id.* at ECF 2–3.

²¹ Compl. (Doc. No. 1), *United States v. Credico*, Crim. No. 14-118 (E.D. Pa. filed Feb. 7, 2014) (charging Credico with making threats to FBI agents and their family members in violation of 18 U.S.C. § 15(a)(1)(B)). Credico was arrested for these charges on February 12, 2014.

²² Allocatur for Filing a Successive Pet. for Writ of Habeas Corpus (28 U.S.C. § 2244), *In re Justin Credico*, C.A. No. 16-3802 (3d Cir. filed Oct. 13, 2016).

²³ *Elonis* examined the mental state a defendant must possess to be convicted under 18 U.S.C. § 875(c), a federal statute governing the transmission in interstate commerce of a communication

Third Circuit denied Credico's application because *Elonis* did not announce a new rule of constitutional law.

A few weeks later, on December 1, 2016, Credico filed his Motion for Rule 60(b) Relief. Credico asserts that he now has new evidence "to explain away the procedural default because of the officials' actions in hindering his first direct appeal."²⁴ Specifically, Credico claims that he was "recently . . . made aware by the Superior Court Clerk" that when he filed his first appeal with the Superior Court in January of 2012, the "officials repeatedly impeded and mistakenly placed his address as being at Chester County Prison."²⁵ He claims he was homeless and the "15th Judicial District," which appears to include the Adult Probation/Parole Office, was supposed to be holding his legal mail for him. He points to the trial judge's statement that he was going to be released from prison after the trial as evidence that "all parties knew" that the Superior Court's listing of his home address for receipt of legal mail as Chester County Prison was incorrect.²⁶ He asserts that despite this knowledge, "once he was released [from prison], the govt still insisted upon sending all legal material to the Prison."²⁷ Yet, he does not contend that he provided the Superior Court or any court an address where he could receive mail or that he checked the dockets to monitor the status of his appeal.

Credico argues that the Superior Court sent all of its orders to a place where he

containing a threat to injure someone. The *Elonis* Court held that to be convicted under § 875(c), the government must prove that the sender of the communication intended it to be viewed as a threat, not that a reasonable person would regard it as a threat.

²⁴ Mot. for Rule 60(b) Relief (Doc. No. 26) at 6.

²⁵ *Id.* at 1.

²⁶ *Id.* at 2, 5.

²⁷ *Id.* at 4.

no longer resided, the Chester County Prison. Consequently, he never received the Superior Court's order requiring him to file a docketing statement, resulting in the dismissal of his appeal.

Presumably referring to Judge Yohn's February 25, 2014 opinion and order, Credico contends that "throughout its entire memorandum," the district court "relied upon a mistaken belief by the govt that they sent Credico his legal filings needed for his First Appeal . . . but they sent those legal materials to a Prison not to Credico."²⁸ In essence, Credico asserts that he failed to timely file his direct appeal and PCRA petition because government officials intentionally or negligently provided the Superior Court with an incorrect address. As a result, he did not receive notice of the Superior Court's dismissal of his premature appeal from his conviction and the Common Pleas Court's denial of his post-sentence motions.

Discussion

Before we consider the merits of Credico's Rule 60(b) motion, we must first determine whether we have jurisdiction to consider it. If the motion, cast as a Rule 60(b) motion, is actually a second or successive habeas petition, we do not have jurisdiction.

Under the Antiterrorism and Effective Death Penalty Act's ("AEDPA") "second or successive petition" rule, a prisoner is not permitted to file a second habeas petition after his previously filed habeas petition attacking the same conviction was decided on the merits. 28 U.S.C. § 2244(b)(1).²⁹ If the petitioner makes a new claim in a second or

²⁸ *Id.* at 2, 4.

²⁹ Section 2244(b)(1) states that a "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C.

successive petition, he must first receive permission from the court of appeals. Absent such authorization, the district court lacks jurisdiction over the matter and is not permitted to consider the merits of the subsequent petition. 28 U.S.C. § 2244(b)(3)(A); *Gonzalez v. Crosby*, 545 U.S. 524, 529–30 (2005); *Robinson v. Johnson*, 313 F.3d 128, 139–40 (3d Cir. 2002).

What is a “second or successive” habeas petition is not defined by AEDPA. The Supreme Court has interpreted it as a filing, whether labeled a habeas petition or a Rule 60 motion, that makes a claim on the merits attacking the same conviction and/or sentence that was challenged in a previous petition. *Gonzalez*, 545 U.S. at 532, 538. A motion for relief from judgment that does not assert or reassert claims of error in the movant’s state-court conviction, but challenges only the district court’s failure to reach the merits of a prior habeas petition is not a second or successive habeas petition. *Id.* at 538; *Pridgen v. Shannon*, 380 F.3d 721, 727 (3d Cir. 2004).

A petitioner cannot circumvent the “second or successive” petition bar by couching his petition in the language of a Rule 60(b) motion to present new claims. The *Gonzalez* Court characterized such a maneuver as an impermissible effort to bypass AEDPA’s requirement that new claims must be dismissed unless they are based on “newly discovered facts” or “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Gonzalez*, 545 U.S. at 531–32 (citing 28 U.S.C. § 2244(b)(2)); see also *Blystone v. Horn*, 664 F.3d 397, 411 (3d Cir. 2011).

In contrast, a filing that does not challenge the substance of a federal court’s

§ 2244(b)(1).

resolution of a claim on the merits, but attacks a defect in the integrity of the federal habeas proceeding, is not a “claim” for purposes of Section 2244(b). *Gonzalez*, 545 U.S. at 532 & nn.4–5. In other words, a habeas petition presents a substantive challenge whereas a Rule 60 motion is a procedural attack. Consequently, when no habeas “claim” is presented, there is no basis to deem a later filing “second or successive” under § 2244(b). *Id.* at 533. In short, in *Gonzalez*, the Supreme Court drew a distinction between a substantive challenge and a procedural one.

When a motion is filed in a habeas case under a Rule 60(b) label, the district court must determine whether the motion is actually a “second or successive” habeas petition within the meaning of § 2244(b). *Id.* at 530; *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005); *Sharpe v. United States*, Crim. No. 02-771, 2010 WL 2572636, at *2 (E.D. Pa. June 22, 2010). If it is not a “second or successive” petition, no authorization from the court of appeals is required. Thus, we must determine whether Credico’s motion is a true Rule 60 motion or an impermissible successive habeas petition.

Credico argues that his motion is not a second or successive habeas petition because it attacks the manner in which the earlier habeas judgment was procured, not the underlying conviction.³⁰ He claims that the district court’s determination that his claims are procedurally defaulted was based upon incorrect evidence. He contends that the district court “relied upon a mistaken belief by the govt that they sent Credico his legal filings needed for his First Appeal . . . but they sent those legal materials to a Prison not to Credico.” Because the court determined that his procedurally defaulted claims were not excused, the court never reached the “merits” of his habeas petition

³⁰ *Id.* at 3.

attacking his underlying conviction. On that basis, Credico argues that we should consider his new evidence showing that his procedural default should be excused.

Credico is challenging an error in the integrity of the habeas proceeding—the mistaken assumption that he had notice of the state court’s orders when he did not. He claims that the error prevented the district court from reaching the merits of his petition. Thus, his current motion is not a second or successive habeas petition.

Treating Credico’s motion under Rule 60(b), we shall consider the timeliness and the merits of the motion. As we explain, Credico’s motion is untimely and lacks merit.

Rule 60(b) permits a court to relieve a party from a final judgment or order in certain circumstances. Fed. R. Civ. P. 60(b). Though he did not specify the provision in Rule 60 under which he seeks relief, it appears that Credico is making a claim under Rule 60(b)(2) based on “newly discovered evidence,” Rule 60(b)(3) for fraud or misrepresentation by the opposing party, or Rule 60(b)(6), the “catch-all” provision.

Rule 60(b)(2) provides that if a party produces “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b),” the judgment may be opened. This standard requires that the new evidence: (1) be material and not cumulative; (2) would likely have changed the trial’s outcome; and (3) could not have been discoverable before trial through the exercise of reasonable diligence. *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 264 F.3d 302, 309 (3d Cir. 2001) (citation omitted). Under Rule 60(b)(3), Credico must establish that the adverse party engaged in fraud or other misconduct, which prevented him from fully and fairly presenting his case. *Stridiron v. Stridiron*, 698 F.2d 204, 206–07 (3d Cir. 1983) (citation omitted). Rule 60(b)(6) authorizes a court to grant relief from a final

judgment for any reason other than those listed elsewhere in the Rule. *Cox v. Horn*, 757 F.3d 113, 120 (3d Cir. 2014) (citation omitted). A movant can prevail under Rule 60(b)(6) only in extraordinary circumstances. He must demonstrate that “extreme and unexpected hardship” will result absent such relief. *Jackson v. Danberg*, 656 F.3d 157, 165-66 (3d Cir. 2011) (citation omitted).

A motion brought under Rule 60(b)(2) and (3) must be filed no more than a year after the entry of the judgment. One brought under Rule 60(b)(6) must be filed within a “reasonable time.” Fed. R. Civ. P. 60(c)(1).

Judge Yohn’s order was entered on February 25, 2014. Credico did not file his Rule 60(b) motion until December 1, 2016, almost three years later. His motion was not filed within the one-year time limit applicable to Rule 60(b)(2) and (3). Nor was it filed within a “reasonable time” as required by Rule 60(b)(6). Thus, Credico’s motion, whether brought under these provisions, is untimely.

Even if the motion were timely, Credico’s claim has no merit. His failure to exhaust his state court remedies was not caused by governmental interference. Nor is there any “new evidence” to excuse his failure.

To establish cause to excuse procedural default, a petitioner must demonstrate that “some objective factor external to the defense impeded [petitioner’s] efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). This includes interference by officials, ineffective assistance of counsel, unavailable evidence, or some other external impediment that prevents a petitioner from constructing or raising his claim. *Id.* at 488, 492.

There was no governmental interference with Credico’s appellate rights. The

state court did not impede his pursuit of an appeal. The courts were not obligated to search for him and to find him housing where he could receive notices and orders. It was his responsibility to advise the courts of any change of address and to monitor the dockets.

Credico argues that the Superior Court sent its orders to an incorrect address, his old address. He did not then and does not now provide an address where mail could have reached him at that time. Had he been represented by counsel, notice would have been received. Credico, having insisted on representing himself and having no permanent residence, assumed the risk that he would not receive communications from the Superior Court. He had an obligation to check the dockets.

In addition, what Credico calls “new evidence” is not new. The address where the Superior Court and the Common Pleas Court sent copies of notices and orders was not recently discovered. It was listed on the court records. Credico could have verified the address or addresses where the Superior Court sent notices and orders directed to him when he filed his habeas petition on June 8, 2012 or, at least, when he filed his objections to Judge Sitarski’s report and recommendation.

In his habeas petition, Credico stated he was homeless when he filed his appeals to the Superior Court and that the “15th Judicial District” was supposed to be holding his legal mail for him. He has repeatedly asserted that he did not have a mailing address where he could have received orders. Thus, by his own admission, the officials had no alternative address to send him notices.

Credico knew that the Common Pleas Court would rule on his post-sentence motions within 120 days of his filing them. At sentencing, Judge Streitl explained to

him that she had to decide any post-sentence motion within 120 days. She also told him that he had thirty days from the denial of a post-sentence motion to file an appeal in the Superior Court.³¹

Judge Streitel issued the order denying his post-sentence motions on April 23, 2012, which was 118 days after the motions were filed. Having filed his post-sentence motions himself, Credico knew when they were filed. He could have checked the Common Pleas docket periodically throughout the 120 day period. He did not.

Significantly, Credico actually received notice that the two orders had been issued when there was still time to file a timely request for PCRA relief. On June 19, 2012, in his report and recommendation regarding Credico's first post-sentencing habeas petition, then-Magistrate Judge Restrepo noted that the Superior Court had dismissed Credico's appeal on March 5, 2012, and that the Common Pleas court had ruled on his post-sentence motions on April 23, 2012.³² Judge Restrepo set forth the procedural history of the criminal proceedings as follows:

- On December 27, 2011, Credico filed post-sentence motions;
- In January 2012, Credico filed a notice of appeal in the Superior Court, while the post-sentence motions were pending;
- On February 21, 2012, the Superior Court ordered Credico to file a docketing statement;
- On February 23, 2012, the Superior Court issued an Order directing Credico to show cause, within 14 days, why his appeal should not be quashed as interlocutory since the trial court had not entered an Order regarding his post-sentence motions;
- On March 5, 2012, the Superior Court ordered the appeal dismissed due

³¹ Answer App. A at ECF 219–20.

³² R. & R. (Doc. No. 3), Credico v. Adult Prob./Parole (Chester Cty.), Civ. No. 12-3269 (E.D. Pa. filed June 19, 2012).

to Credico's failure to file the docketing statement;

- On April 23, 2012, the Court of Common Pleas denied Credico's post-sentence motions.³³

Judge Restrepo explained that Credico had not properly exhausted his habeas claims in state court because he had not filed a request to reinstate his direct appeal following the denial of his post-sentence motions, and had not requested any PCRA relief. He recommended that Credico's habeas petition be dismissed without prejudice for failure to exhaust state court remedies.

Judge Restrepo's report clearly advised Credico that he still had avenues in the state court system to exhaust his remedies. Instead of accepting this invitation and advice, Credico continued to file motions and petitions in the federal courts while the time to file for relief in the state court was passing and ultimately expired.

Although Credico claims that he did not immediately receive notice of the report and recommendation, he filed a notice of appeal to the Third Circuit from Judge Yohn's July 12, 2012 order adopting the report and recommendation on September 11, 2012.³⁴

By at least September 11, 2012, Credico was aware that he had to meet the state's procedural requirements. At that point, he still had time to present his claims to the state court for appellate review, including filing a timely PCRA petition. However, instead of following Judge Restrepo's guidance, Credico chose to appeal the dismissal

³³ *Id.* at 1–2.

³⁴ Credico filed no objections to the Report & Recommendation. On July 13, 2012, Judge Yohn entered an order adopting it. Order (Doc. No. 4), *Credico v. Adult Prob./Parole* (Chester Cty.), Civ. No. 12-3269 (E.D. Pa. filed July 12, 2012). On September 11, 2012, Credico filed a notice of appeal from the district court's July 13, 2012 order almost sixty days after its entry. In a request to the Third Circuit to reopen the time to file this appeal, Credico claimed that he had not received notice of the order because he was homeless and had rabies. Mem. of Law in Supp. of Appeals at 1, *Credico v. Adult Prob./Parole* (Chester Cty.), C.A. No. 12-3779 (3d Cir. filed Nov. 21, 2012).

of his petition.

If Credico did not understand the implications of the dismissal of his habeas petition without prejudice for failure to exhaust state court remedies, his inability to comprehend the relief is not an excuse. As Judge Yohn explained, Credico knew the risks in proceeding *pro se* on appeal, including the need to comply with procedural rules and the risk of waiving claims for failure to comply. Yet, Credico insisted on proceeding *pro se*. As Judge Yohn summarized, “Having refused the proffered counsel, and having failed to comply with the rules, Credico cannot now plead cause because he [could not] comply with Pennsylvania’s appellate rules.”

Credico cannot claim that he did not know of the March 5, 2012 Superior Court Order and of the April 23, 2012 Order entered by the Common Pleas Court until after his claims were procedurally defaulted. At least by September 11, 2012, when he filed a notice of appeal from Judge Yohn’s order adopting Judge Restrepo’s report and recommendation, he knew there was still time to file a timely request for PCRA relief. He cannot now claim that governmental interference prevented him from complying with the state’s procedural rules and pursuing his state court appeals. The fault is his.

Conclusion

Credico’s motion is untimely. Even if it were timely, he has proffered no “new evidence” that government officials caused the Superior Court to incorrectly list his address where he could have received court notices. Government officials did not interfere with his ability to comply with state rules that it resulted in his procedurally defaulting on his claims. Therefore, Credico’s Motion for Relief under Rule 60(b) shall be denied.